No. 11,307

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TONY LEGATOS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Codes

Regulations

Pages

Rules

Statutes

Texts

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JURISDICTION.

This case comes to the Circuit Court of Appeals from a jury verdict finding the defendant, Tony Legatos, guilty of violating Section 2871, Internal Revenue Code, and the judgment of the District Court for the Northern District of California, Northern Division, Hon. Martin I. Welsh, presiding, sentencing the defendant to imprisonment for two years, and to pay a fine of $1,000.00.

STATEMENT OF PLEADINGS AND FACTS.

(A) PLEADINGS.

Indictment.

The indictment in this case consists of two counts. The second count charged the violation of Section 2803 of the Internal Revenue Code. The jury acquitted the defendant on this count and it is eliminated from discussion.

The indictment in the first count charged that defendant reused 31 liquor bottles (specifying the labels on the bottles), in violation of the provisions of Section 175.41 of Regulations 13, prescribed by the Secretary of the Treasury, in pursuance of Title 26 U.S.C. Section 2781. (Printed record, pages 2 and 3.)

Motion to dismiss, quash and make more certain.

Prior to plea of not guilty, motion to dismiss and quash the first count of the indictment was filed, setting forth that the allegations of the First Count did not state an offense against the laws of the United States, and a motion for an order directing the first count of the indictment to be made more certain: (a) to designate and indicate for what purpose, if at all, such 31 liquor bottles were reused; and (b) how and in what manner defendant violated the provisions of Section 175.41 of Regulations 13. (Printed record, pages 4 and 5.)

The motions were denied. (Printed record, page 6.)

Motion to suppress.

Prior to trial, appellant filed a verified petition and motion to suppress evidence and return property. This petition alleged that federal officers were in possession of 31 bottles of liquor, referred to in the indictment, obtained by a search and seizure without a warrant and without the consent or authority of the defendant. (Printed record, pages 6 to 8.)

The motion to suppress was denied. (Printed record, page 9.)

On the hearing of the motion to suppress, evidence was introduced which will be stated in the Statement of Facts.

Motion for new trial.

After verdict, and prior to judgment, written motion was filed under Rule 29(b) of the Federal Rules of Criminal Procedure, for renewal of motion for judgment of acquittal and in the alternative, motion for a new trial. This motion set forth generally the matters of errors made the specification of errors on this appeal. (Printed record, pages 16 to 18.)

(B) STATEMENT OF FACTS.

The facts in the instant case are simple and for the most part undisputed. Tony Legatos owns 16 or 17 restaurants and bars in Northern California, including the Golden Tavern at 621 K Street, Sacramento, operated by him through Nick Theodoratus, manager. Chris Maritsas, co-defendant, was employed at the tavern as a bartender. On July 18, 1946, agents

of the Alcohol Tax Unit visited the establishment without a warrant, showed their credentials, went behind the back bar and removed some forty bottles. These they tested with a "Williams' Test Set" to ascertain the alcoholic content and character of liquor and finding thirty-one of the bottles "irregular", confiscated them.

The following day, the agents talked to Maritsas and Legatos. Maritsas told the agents that he had filled fourteen of the bottles labelled "Schenley Whiskey" with equal parts of Schenley Whiskey and Ron Marana rum, and that the remaining confiscated bottles had been refilled by other bartenders by pouring from one bottle to another. Maritsas at the time stated that Legatos was ignorant of these actions and Legatos likewise advised the agents that he knew nothing of any refilling—that he had always instructed his bartenders to obey all laws and not tamper with bottles.

Facts which create an issue of law pertinent to this appeal are taken from the record as follows:

On the hearing of the petition to suppress evidence and return property, testimony was taken and witnesses were called and sworn and testified as set forth in summary form:

Tommie O'Leary. I am employed as a bartender at the Golden Tavern. Leonard D. Sanderson came into the bar on July 18th with another man, showed me his badge, told me he wanted to inspect the liquor in the back bar, so I let him go. He took all the open

bottles of liquor to a table in the rear and later took them away. I am not the manager of the place. (Printed record, pages 30 to 35.)

Tony Legatos. The search on July 18th, was made without my knowledge or authority. Nick Theodoratus is the manager of the Golden Tavern. On July 18th he was sick. I do not know whether he was on the premises or not. He has authority to conduct the business. (Printed record, pages 35 to 38.)

Leonard D. Sanderson, Inspector, Alcohol Tax Unit. On July 18th, accompanied by Mr. Tschierschky, another agent of the Alcohol Tax Unit, I went to the Golden Tavern, at ten o'clock in the morning. We had no search warrant. We presented our credentials to Mr. O'Leary, told him we were there to inspect the open bottles, went behind the bar, took approximately 40 open bottles to a table in the rear to conduct our tests. We had no permission from Mr. Legatos. (Printed record, page 42.) Mr. Theodoratus came in about 10:20 while we were testing with the Williams' Test Set. We had not completed our test, when Mr. Theodoratus came in. We had tested a few bottles and found that the contents did not conform to the labels. (Printed record, pages 43 and 44.)

The only conversation we had with Mr. Theodoratus was while he was working in the basement on some invoices; as soon as we found a bottle that was bad, we would take the bottle down to him and show him our test and he could not explain it because he said

he was home ill. (Printed record, page 46.) The authority we had to enter the premises was to make routine inspections, revenue stamps, wine stamps, bootleg whiskey—licensee. No one objected to our search or requested us to leave the premises, and no force or duress was used. (Printed record, page 49.)

(C) TESTIMONY ON THE TRIAL OF THIS CASE.

Witnesses were called for the government, sworn and testified. The portions of their testimony material to this appeal, not otherwise set forth in the statement of facts, is set forth in summary form with objection and rulings being shown in brackets and italicized.

Leonard D. Sanderson. (Testified generally to same facts as in motion to suppress, and in addition.) No one, other than Tommie O'Leary, bartender, was in authority when Inspector Tschierschky and I visited the Golden Tavern on July 18th. We removed the bottles from behind the back bar to test with the Williams' Alcohol Test Set and took the bottles to a rear booth at the rear table for that purpose. (Printed record, pages 54 and 55.)

The Williams' Test Set is field equipment to show whether blended spirits have been put in straight whiskey, or the bottle has been diluted with waters or liquids. (Printed record, page 56.)

(Permission granted at this time to cross-examine the witness with reference to the search and seizure.) (Printed record, page 59.)

I am not a chemist and have no technical training in chemistry. (Printed record, page 60.)

The Williams' Test consists of a graduated tube, along with a chemical compound used in connection with distilled spirits. In order to use the Williams' Test, it is necessary to take from a bottle a portion of the material that is in the bottle, put it in the tube and rinse out the tube. (Printed record, page 61.)

(*Further examination of witness Sanderson on the nature of the search and seizure denied.* (*Printed record, page 64.*)

Motion made that evidence relative to the search and seizure be excluded on the ground it was a contravention of the defendant's rights under the Fourth and Fifth Amendment. (*Printed record, page 65.*) *Motion denied.* (*Printed record, page 66.*).)

31 bottles introduced in evidence for identification. (Printed record, pages 67 to 86, inclusive.)

At about 10:20, Mr. Theodoratus came to the establishment and I went downstairs to have a talk with Mr. Theodoratus in regard to his knowledge of these bottles having been refilled. (Printed record, pages 86 and 87.) We took the bottles and delivered them to Mr. R. F. Love, Bureau of Chemists, in San Francisco. (Printed record, page 88.)

The next day, at approximately 12:00 o'clock, we had a conversation with defendant Maritsas, about refilling the bottles. (Printed record, page 88.)

(*Objection made that statements made by defendant not admissible until the corpus delicti proved. Objection overruled.* (Printed record, page 89.).)

Maritsas told us that 14 of the Schenley bottles that had been introduced were filled by him with half rum and whiskey and the remaining 17 bottles were refilled by bartenders at the close of the day's business by pouring small portions of one brand of spirits into another bottle. (Printed record, page 90.)

I had a conversation with Legatos. He said he had no knowledge of this and he had instructed his bartenders and his managers absolutely not to refill any spirit liquor or pour it from one bottle to another. (Printed record, page 90.)

Alex Tschierschky, agent of the Alcohol Tax Unit, testified substantially the same as Sanderson.

Dr. R. F. Love, Chemist, Internal Revenue Bureau. The 31 bottles introduced for purposes of identification were brought to me on the 1st day of August, 1945. I analyzed their contents, to determine the proof or alcholic content, the acidity, color and the solid matter and in some, whether or not they contained caramel. (Printed record, pages 114 and 115.) I used a control bottle in making the test, namely, an unopened bottle of the same brand as the one in question; i.e., when I made a test of the bottles labelled Schenley's, I had a bottle of Schenley's which had been unopened and broke the seal and made a test of that bottle for control. (Printed record, page 117.)

With reference to this Exhibit 6 for identification, I tested it for proof and the proof is 85.5. The label says it should be 86. I found it had 21.6 parts of acid, and the control bottle 32.4, the color in the Exhibit was 7.4 and in the control bottle 9.5, in solids 105.4 and in the control bottle 148.2. (Printed record, pages 116, 118.)

(*To the question, "What does that indicate?", referring to the above testimony, objection was made that it called for an opinion and conclusion of the witness. Objection overruled.* (*Printed record, page 119.*).)

The figures are small, but the difference is relatively large, indicating that the liquor in this bottle is not the same as the liquor in the control bottle, or the same brand, that rum has been added. I cannot tell what percentage of rum. (Printed record, page 119.)

31 bottles admitted into evidence on same character of testimony and subject to same and other objections. (Printed record, pages 120 to 144.)

Laverne Lewis. I live in Sacramento. I went to work for Tony Legatos in 1941 and worked for him until the last few days. I worked as a clerk or bookkeeper, with offices at 220 Ochsner Building. (Printed record, page 169.)

The Log Cabin Tavern is a place owned by Mr. Legatos. There about February 1st, of 1945, I had a conversation with Mr. Legatos about some rum.

(Printed record, page 170.) Mr. Legatos said: "I have forty or fifty cases here and I am going to move it. I am going to give each one of my managers so much and ask them to press it in their sales". (Printed record, page 171.) I know the rum was moved from the Log Cabin Tavern and I know some of it, but not how much, went to the Golden Tavern at 621 K Street. (Printed record, page 171.)

The only other conversations I had with Mr. Legatos about rum, was when we talked between ourselves, he said: "I am going to get rid of this rum, I am overstocked on it." (Printed record, page 172.)

Cross-Examination.

At the time I had my conversation with Mr. Legatos, he had forty or fifty cases of rum at 701 Jay Street. This rum was taken to other places, including one offsale premises at 622 K Street. (Printed record, page 174.) He has five places in Sacramento and five places in Vallejo, some restaurants without liquor licenses, and other places in Northern California. (Printed record, page 175.)

At the time he stated he wanted to get rid of the forty or fifty cases of rum, he did not say anything about mixing rum with whiskey and I did not want to convey that idea. (Printed record, page 176.)

I know of my own knowledge that Mr. Legatos insists that his places be operated according to law. (Printed record, page 176.)

Redirect Examination.

(*Objection made on ground of improper redirect and attempt to cross-examine own witness on conversations had between government attorney and witness. Objections also made to calling for opinion and conclusion of witness as to question of witness's statement of her opinion if Legatos had violated law. Objections overruled.* (Printed record, pages 177, 178.).)

Since I talked to Mr. Seawell yesterday, I have talked to Mr. Legatos and Mr. Brannely. (Printed record, page 177.) I did not tell you, Mr. Seawell, that Mr. Tony Legatos did not operate his bar in a lawful manner, what I said was in a very careless manner, I might have told you that in my opinion he knew about the rum being put into these bottles. I said he had said to push the rum and brandy sales. (Printed record, page 178.)

Recross Examination.

My conversation with you about this case, Mr. Brannely was that I told you I did not like your attitude, and I told you nothing. (Printed record, page 180.)

(*Motion for judgment of acquittal made and denied.* (Printed record, page 183.).)

TESTIMONY FOR DEFENDANT.

Three character witnesses testified that the defendant Tony Legatos had a good reputation in the Sacramento community as a law abiding citizen. These witnesses were, Edward Thomas Coghill, owner printing plant (Printed record, pages 184 to 186), Walton E. Holmes, Vice-President and Secretary of the Capital National Bank (Printed record, pages 186 to 193), George E. Zoller, Banker (Printed record, pages 194 to 195), and Frank Raymond Elmer, owner of Elmer Paper Company, Supervisor, County of Sacramento. (Printed record, pages 211 to 216.)

Chris Maritsas, co-defendant. On July 17th of last year, I was employed by Tony Legatos as a bartender. I admitted to the agents in July and later that I filled 14 bottles of Schenley's with rum, because I was short of Schenley's and the rum was good stuff to put in. (Printed record, page 196.) The rum was taken from bottles with government stamps on them. (Printed record, pages 197 and 198.)

I received no profit from the sale of liquors. (Printed record, page 201.)

Mr. Legatos never gave me any instructions to put rum in whiskey or any other bottle and I never had any discussion with Mr. Legatos about doing it. (Printed record, pages 202 and 203.)

Mr. Legatos used to come in the place sometimes once in two weeks, sometimes once a month, sometimes he did not come for a month and a half. I am not there all the time. I used to work from 4:00 to 12:00.

I do not know whether he is there between the time the place opened at 4:00 o'clock or not.

Tony Legatos, defendant. I have lived in Sacramento since 1918. I am a restaurant man. I operate between 16 and 17 restaurants and bars in San Francisco, Sacramento and Vallejo. (Printed record, pages 204, 205.) I did not know anything about putting rum into whiskey bottles at the Golden Tavern until the 19th of July, when the agents notified me. I told them I knew nothing about it. (Printed record, page 205.) I have a manager to operate the Golden Tavern. (Printed record, page 206.)

In connection with Mrs. Lewis' testimony, I did tell her I had 40 or 50 cases of rum and I told her I was going to send it to different establishments. (Printed record, page 207.) I had no intention at any time that the rum sent to my various establishments should be mixed with whiskey. (Printed record, page 208.)

I am familiar with the laws and rules with relation to the conduct of bars. I spend some of my time in Sacramento. I spend lots of time in Vallejo. I reside here and have my office here and spend most of my time here. I seldom go into the bars that I own. I keep books and have an accountant go over with me how much the bars sell. I can't say I do it every day. (Printed record, page 210.)

Evidence closed, motion for judgment of acquittal made and denied. (Printed record, page 215.)

STATUTES AND RULES INVOLVED.

The following statutes and rules are pertinent to a consideration of this appeal:

(a) Section 2871 of Internal Revenue Code, 26 U.S. Code 2871, 53 Stat., 331, the full text of which is:

"REGULATION OF TRAFFIC IN CONTAINERS OF DISTILLED SPIRITS.

Whenever in his judgment, such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him, and permits issued thereunder if required by him (1) to regulate the size, branding, marking, sale resale, possession, use and re-use of containers (of capacity of less than five wine gallons) designed or intended for use for the sale at retail of distilled spirits (within the meaning of such term as it is used in Section 2803) for other than industrial use, and (2) to require, of the persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith. Whoever willfully violates the provisions of any regulation prescribed, or the terms or conditions of any permit issued, pursuant to the authorization contained in this section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000 or be imprisoned for not more than two years, or both; and, notwithstanding any criminal conviction, the containers involved in such violation shall be forfeited to the United States, and may be seized and condemned by like

proceedings as those provided by law for forfeitures, seizures, and condemnations for violations of the internal-revenue laws, and any such containers so seized and condemned shall be destroyed and not sold. Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to law, and shall apply as well to persons not liable for tax under the internal-revenue laws as to persons so liable."

(b) Section 175.41 of Regulations No. 13, Secretary of the Treasury Section 41 of Code of Federal Regulations, Title 26, Internal Revenue, Chapter 1, Bureau of Internal Revenue, Sub-Chapter C, Miscellaneous Excise Tax, Part 175, Traffic in Containers and Distilled Spirits, the full text of which reads:

"Section 175.41. No liquor bottle or other authorized container shall be reused for the packaging of distilled spirits, except as provided in Section 175.14, nor shall the original contents, or any portion of such original contents, remaining in liquor bottle or other authorized container be increased by the addition of any substance."

STATEMENT OF POINTS.

The following is the statement of points filed by appellant with reference to the printed record necessary for consideration of each point respectively:

1. The court erred in denying the motion to quash the first count of the indictment.

Indictment. (Printed record, pages 2 and 3.) Motion to dismiss and motion to make more certain. (Printed record, pages 4 and 5.) Denial of motion. (Printed record, page 6.)

2. The court erred in denying defendant's motion to suppress evidence and return property.

Written motion. (Printed record, pages 6 and 8.) Denial. (Printed record, page 9.) Testimony at time of trial. (Printed record, pages 59 to 66.)

3. The court erred in admitting over objection, testimony based on an unlawful search and seizure.

Motion to suppress made and denied during trial. (Printed record, pages 65 and 66.)

4. The court erred in admitting into evidence over objection, bottles and the contents thereof, obtained through unlawful search and seizure.

Objection to ruling. (Printed record, pages 65 and 66.)

5. The court erred in admitting into evidence without proper foundation, over objection, bottles and their contents.

Objections made. (Printed record, pages 116 and 119.) Objection goes to all testimony. (Printed record, page 120.)

6. The court erred in admitting over objection testimony as to the statement of a co-defend-

ant prior to the establishment of the corpus delicti.

Objection made and overruled. (Printed record, page 89.)

7. The court erred in admitting over objection, hearsay testimony and opinion evidence of the government witness, Laverne Lewis, and in allowing the government attorney to cross-examine such witness.

Objections and ruling. (Printed record, pages 177 to 179.)

8. The court erred in denying defendant's motion for judgment of acquittal at the close of the government's case.

Motion made and denied. (Printed record, page 183.)

9. The court erred in denying defendant's motion for judgment of acquittal at the close of the taking of testimony in the case.

Motion made and denied. (Printed record, page 215.)

10. The court erred in instructing the jury:

(a) By giving inconsistent instructions.

Waived.

(b) By instructing the jury that Section 2871 of the Internal Revenue Code required no intent to constitute a violation.

The instruction is as follows:

"You are instructed that the offense charged in this indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. This defendant, being engaged in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agent, was bound at his peril to see that there was no re-use of any bottles for the purpose of containing distilled spirits, which had once been filled and stamped under the provisions of the Act in question, without removing and destroying the stamp previously affixed to such bottle. If the bottles in question were refilled, they have been re-used—if the bottles in question were refilled, they have been re-used. Agents of the defendant Tony Legatos, if one of them acting—I will go over this again.

If the bottles in question were refilled, they have been re-used. If one of the agents of the defendant Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant's liability is the same as if he had re-used it himself." (Printed record, page 256.)

(The instruction was given three times, once in the general instruction, at page 256, as quoted above, and again on special request for advice from the jury at pages 264 and 265. Objections to the giving of the instruction appears in the printed record at pages 262, 263, 266, 278.)

(c) By instructing the jury that irrespective of the lack of knowledge of defendant as an em-

ployer, the defendant could be held criminally liable for the acts of his employee.

This is the same instruction as given in 10(b) above, with same reference.

(d) By instructing the jury on Treasury Department Regulations, namely, Section 188.57 of Regulations 6, and Section 22 of Regulations 5.

Waived.

11. The court erred in refusing to instruct the jury:

(a) That the jury, in order to find the defendant guilty under the first count, must find that the defendant wilfully violated Section 175.41 of Regulations 13.

Proposed Instruction 4, at page 237, printed record, was as follows:

"Before either defendant may be found guilty under the first count of the indictment, it is necessary that you find beyond all reasonable doubt that he 'wilfully violated' the regulations involved. Wilfullness is made a vital ingredient of the crime by statute, and this means that the defendant must have had a knowledge and a purpose to do wrong."

(b) That the contents of the bottles introduced into evidence were not evidence against the defendant.

Waived.

(c) That an employer was not criminally responsible for the acts of his employee unless the employer authorized such acts.

Proposed Instruction 10 appeared at pages 239 and 240 of printed record and was as follows: "You may not presume that other persons, even though they were employees, had authority to do a criminal act on behalf of either defendant; and if you find that some or all of the bottles described in the First Count of the Indictment were re-used in violation of regulations, but do not find that both of the defendants personally re-used the bottle or bottles, then as to each defendant who did personally not re-use any bottles, unless you find beyond all reasonable doubt that he directly authorized or consented to the re-use in violation of regulations it is your duty to acquit him under the First Count of the Indictment."

No specific objection was made for failure to give instruction 10, but objection to the whole character of instruction on intent appears at pages 266 to 268 of the printed record.

12. The court erred in denying defendant's motion for a new trial, or in the alternative, a judgment of acquittal.

The written motion appears at pages 16 to 18, printed record. Denial of the motion appears at page 19, printed record.

ISSUES INVOLVED.

The statement of points on which appellant intends to rely on appeal filed herein, contains twelve points some with several subdivisions. Basically, the points as set forth involve five fundamental issues:

(a) That the indictment in the first count does not state an offense against the United States for the reason that the acts constituting a violation of section 175.41 of Regulations 13 are not specified;

(b) That the evidence was insufficient to justify sending the case to the jury against the defendant Tony Legatos for the reason that no specific act of violation was proved against him and no showing was made that the defendant Legatos had participated in, had knowledge of, or consented to the act of his employee and co-defendant, Maritsas, in refilling certain bottles;

(c) Misconception of the provisions of section 2871 of the Internal Revenue Code by the government and the court resulting in the court instructing the jury that wilfulness was not an ingredient of the crime and that the defendant Legatos was "bound at his peril" for the acts of his employee, and also the refusal of proper instructions on "intent" and that an employer was not liable criminally for the acts of his employee when the acts were without participation, consent or knowledge of the employer;

(d) Violation of defendant's constitutional rights under the fourth and fifth amendment through an unlawful search and seizure;

(e) Errors in the admission of testimony, in particular, testimony of a confession by the defendant Maritsas prior to the proof of the corpus delicti; error in the admission of testimony of an expert witness that in his opinion the bottles were refilled, thus taking from the jury the ultimate fact to be decided by them in the case; error in the admission of testimony of the government witness on the examination by the prosecuting attorney that she might have stated in a private conversation with the United States Attorney that in her opinion Legatos knew about the acts of his employee in refilling the bottles.

The argument to follow will consider the questions of law as thus grouped above, relating them to particular points as they appear in the statement of points filed by appellant.

ARGUMENT.

POINT 1.

THE COURT ERRED IN DENYING THE MOTION TO QUASH THE FIRST COUNT OF THE INDICTMENT.

The indictment in this case in the first count charged that defendant:

> "Did wilfully, knowingly and unlawfully reuse liquor bottles, to wit, a total of 31 bottles, as follows: (There follows a description of whiskey bottles by capacity and label), in violation of the provisions of Section 175.41 of Regulations 13, prescribed by the Secretary of the Treasury, in

pursuance of the provisions of Title 26, U.S.C. Section 2871." (Printed record, pages 2 and 3.)

Thus the gist of this indictment is that the defendant re-used liquor bottles in violation of the provisions of Section 175.41.

A motion to dismiss and quash the first count was filed on the grounds that the allegations did not state an offense against the laws of the United States. At the same time, a motion to make more certain the first count of the indictment was filed, the motion seeking that the indictment be made more certain in the following respects: (a) To designate and indicate for what purpose, if at all, said liquor bottles were re-used; and (b) How or in what manner defendant violated, if at all, the provisions of Section 175.41 of Regulations 13. (Printed record, pages 4-5.)

It was error to deny the above motion. Section 175.41 of Regulations 13 derives vitality from the provisions of Section 2871 of the Internal Revenue Code. Any rule adopted is subordinate to the statute.

It is conceded that administrative officers under appropriate statutory authority may enact rules and regulations to carry out a policy declared by Congress, even though the statute makes violation of the rules a public offense. (*U. S. v. Grimaud,* 220 U.S. 506, 55 L. ed. 563, 31 S. Ct. 480.)

Such rules and regulations, however, are at all times subordinate to the statute and any rule so adopted must be in accord with the authority granted and the policy of Congress as expressed in the legis-

lation. (*U. S. v. George,* 220 U. S. 14, 55 L. ed. 712, 33 S. Ct. 412, holding that a defendant could not be held guilty of perjury for filing a false affidavit as to facts of occupation of homesteaded lands where the agency's form of affidavit required data as to occupation not contained in the statute "where the charge is a crime it must have a clear legislative basis".)

Section 2871 of the Internal Revenue Code gives authority to the Secretary of the Treasury, in order "*to protect the revenue* * * * *to regulate* the size, branding * * * sales * * * use and re-use of containers * * *" Section 175.41 of Regulations 13 does not regulate—it entirely prohibits re-use for certain purposes. It might be contended that an entire prohibitory rule, adopted under statutory authority to regulate in protection of the revenue, is void as an attempt to legislate beyond the delegated authority. (See *U. S. v. Bardenheir* (1892), 49 Fed. 846, stating: "Congress was legislating for the protection of the revenue rather than private wrongs".) That contention, however, is not raised in this case for the reason that ample other considerations require a reversal, making discussion of the validity of the rule beyond the confines of strict error.

The point, however, is mentioned to emphasize the severity of the rule and its restrictive characteristics, and to make manifest that, in common with all administrative regulations, care must be exercised in enforcement and prosecution to insure the integrity of the statute as well as the rule. Violations of the rule must be charged with certainty and definiteness and

obviously no less so because it is a rule and not a statute.

Tested by the standards applied to indictments charging violations of statutes, it is submitted the first count is fatally defective and the motion to quash should have been granted. The particular rule, Section 175.41 is not an absolute prohibition of all re-use of liquor bottles. It prohibits the re-use of liquor bottles for (a) the "packaging of distilled spirits", or (b) the increase of the original contents by the addition of any substance. Specific acts for specific purposes are required to violate. A mere allegation that the defendant re-used bottles in violation of Section 175.41 is not a statement of acts constituting an offense. The acts of criminal offense are the re-using of bottles for the purpose of packaging distilled spirits or adding substances to the original content of the bottle. No such acts are set forth in the indictment. Judicial authority settles beyond possibility of challenge that such a failure of statement renders the indictment void.

In *United States v. Standard Brewery* (1920) (251 U. S. 210, 64 L. ed. 229, 40 S. Ct. 139), the defendant was charged with a violation of the wartime prohibition act in the use of cereals in the manufacture of beer containing as much as ½ of 1 per cent alcohol. Proclamation prohibited the use of certain cereals in the manufacture of intoxicating liquors. The court held that the indictment was insufficient, stating:

> "An indictment must charge each and every element of an offense. *Evans v. United States,* 153

U. S. 584, 587, 38 L. ed. 830, 831, 14 S. Ct. Rep. 934, 9 Am. Crim. Rep. 668. We cannot say, as a matter of law that a beverage containing not more than ½ of 1 per cent of alcohol is intoxicating, and as neither indictment so charges, it follows that the courts below in each of the cases correctly construed the act of Congress, and the judgments are affirmed." (251 U. S. 210, 220, 64 L. ed. 229, 235.)

The statement that the defendant "violated Section 175.41 of Regulations 13", falls into a category that the Ninth Circuit Court condemns as "sheerest conclusion". *Collins v. United States* (CCA 9th 1918), 253 Fed. 609, considered an indictment for violating the Espionage Act. The indictment charged that the defendant wilfully made and conveyed false reports and statements with the intent to interfere with the military operation of the United States. The court condemned this as the "sheerest conclusion", as no reports or statements were specified:

> "Now, as to the sufficiency of the indictment: Where a statute declares that certain or specific acts, or the doing of certain things, shall constitute an offense, it is always necessary to state what the accused did whereby he transgressed the law, in order that he may be advised of the specific charge made against him, to enable him to concert his defense, and to avail himself of his conviction or acquittal against further prosecution of the same cause, and, further, to advise the court of the facts relied on for conviction, so that it may determine whether they are sufficient in such a case to state the supposed offense in the language of the statute." (253 Fed. 610.)

In the instant case, no attempt was made to state the purpose for which the bottles were re-used. Neither the defendant nor the court could possibly be advised by the indictment what acts were to be relied upon for conviction. No attempt was made to state the supposed offense in the language of the rule.

As a test of the sufficiency of an indictment the court in the *Collins* case sets out the standard from *United States v. Cruikshank,* 92 U. S. 542, 23 L. ed. 588:

> "Therefore the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged." (253 Fed. 609, 611.)

The indictment in the instant case does not specify the purposes for which the liquor bottles were re-used. The acts of violation, if any, do not appear from the indictment, but must be supplied by implication or by waiting until the trial of the case then to ascertain for the first time what particulars the government relies upon to constitute the offense.

But in *Harris v. United States* (CCA 8th, 1939), 104 F. (2d) 41, it was held that deficiencies in essential averments cannot be supplied by implication:

> "It is fundamental that all the necessary ingredients of the offense must be set out in the indictment, and the omission of any fact or circumstance necessary to constitute the offense will be fatal. *United States v. Cruikshank, et al.,* 92

> U. S. 542, 23 L. ed. 588. Any omission of that nature cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital." (*United States v. Hess,* 124 U. S. 483, 8 S. Ct. 591.)
>
> "Section 189 does not make it a crime to forge *any* paper, or to make a false entry in *any* record. It makes it a crime for a person occupying the position defendant did to make a false entry in any record which he was required to keep in connection with his duties—records of the Postoffice Establishment at Lebanon. The indictment does not say that he made a false entry in any record which he was required to keep in connection with his official duties, nor does it say that he forged or made a false entry in any record of the Lebanon Postoffice." (104 Fed. 41, 45.)

A general reference to a statute or rule, as for example "that the defendant violated Section 175.41", does not supply the essentials of an indictment. This is clearly exemplified by the case of *Hale v. United States* (CCA 4th, 1937), 89 F. (2d) 578.

In the *Hale* case, the defendant was convicted on one count of an indictment which charged violation of the Harrison Narcotics Act. The charge was selling morphine not in the original stamped package. The statute, however, excepted registered retailers who might sell *from* a stamped package. The court held that the indictment was defective for the reason that it should have charged that the sale was not made *in* an original stamped package, nor *from* an original

stamped package. To the contention that the statute supplied the deficiency, the court said:

> "It is elementary that every ingredent of the crime must be charged in the bill, a general reference to the provisions of the statute being insufficient. The Schooner Hoppet & Cargo v. United States, 7 Cranch 389, 3 L. ed. 380; Pettibone v. United States, 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; United States v. Standard Brewery, 251 U. S. 210, 40 S. Ct. 139, 64 L. ed. 229." (89 F. (2d) 578, 579).

The nature of the violation charged in the first count of the indictment in the instant case could only be ascertained upon a trial of the case. The re-use of liquor bottles may be entirely innocent, depending upon the purpose for which the bottles were re-used. But nowhere in the indictment does that purpose appear—the ascertainment of such facts would only be had upon a trial of the case. Only then could one determine if the facts in the mind of the prosecutor constituted guilt or innocence under the law. In this respect, the failure of the indictment parallels the case of *Caldwell v. United States* (CCA 5th, 1934), 139 F. (2d) 121.

The *Caldwell* case involved a charge of conspiracy to violate regulations enacted under the Selective Training and Service Act. The first count charged the defendant Caldwell with a conspiracy in that he caused another registrant to wilfully leave Chicago and proceed to Miami, Florida, wilfully neglecting to inform the registrant's draft board of the change

of address and thus to evade military service under the requirements of the Act. The court held the indictment bad, stating:

> "It is not a violation of the statute to cause a selected man to leave the place of registration. Nor, is it a violation of the statute to wilfully neglect to inform registrant's local board 'of a change of address'. The offense under the act and regulations, is the wilful failure of the registrant 'to keep his local board advised at all times of the address where mail will reach him'. While it may be conceded that the failure to notify the Board of a change in address in all probabilities would as a matter of fact frequently lead to a failure to keep the local board advised of the address where mail would reach the registrant, this does not necessarily follow and at most is only one of the fact elements going to make up the offense rather than the offense itself. On the other hand, one might change his place of residence six times and yet comply with the provisions of the statute. In a case where liberty may be at stake, the criminal charge should measure up to the test of the statute and then be supported by facts. *It is not proper to permit the charge of an act which is innocent in itself under the statute and regulations to be used as a means of trial and as authority for the introduction of evidence disclosing the commission of an offense.* In other words, a violation of the statute and regulations should be charged rather than the allegation of an act which may or may not constitute an offense." (139 F. (2d) 121, 124). (Italics added.)

Paraphrasing the above case and applying the reasoning to the instant case. It is not a violation of Section 175.41 of Regulations 13 to re-use liquor bottles; the offense under Section 2871 of the Internal Revenue Code and Section 175.41 is the wilful re-use of a liquor bottle for the packaging of distilled spirits or the increasing of the original contents by the addition of any substance. By failing to allege the purpose of the re-use of the bottles, the indictment stated a charge innocent in itself, the only function of the indictment being to act as a springboard for the introduction of evidence that might uncover a crime.

It is respectfully submitted that the denial of the motion to quash the first count constituted reversible error.

POINT 2.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND RETURN PROPERTY.

In advance of trial a hearing was had upon defendant Legatos' motion to suppress evidence and return the seized bottles of liquor to him. (Printed record, pages 29-49.) The nature of the search, and of the seizure which followed upon it, are discussed together with the applicable law under Point 3, and reference is made to that portion of the brief for argument upon the error in denying this motion.

POINT 3.

THE COURT ERRED IN ADMITTING, OVER OBJECTION, TESTIMONY BASED ON AN UNLAWFUL SEARCH AND SEIZURE.

The evidence in this case shows that Federal agents entered the defendant's place of business without a warrant, while only a bartender was present, showed their credentials, stated that they were there to inspect the open bottles, went behind the bar, took from behind the bar all open bottles to a table in the rear and then proceeded to test the contents of the bottles by a patented device known as the "Williams' Test Set". (Printed record, pages 54 and 55.) The "Williams' Test Set" equipment consists of a graduated tube, together with a chemical reagent; the testing is done by abstracting a portion of the contents of the bottles to be tested, rinsing out the tube and then taking an additional portion from the bottle and applying the chemical reagent so that the alcoholic content and the character of the liquor may be ascertained. (Printed record, page 61.)

At the time the agents removed the bottles from the back bar and commenced their tests, no one in authority was present. Later, after some of the bottles had been tested, the manager of the place arrived at the premises and went to the basement. There the officers would go on finding an "irregular" bottle and ask for an explanation from the manager, receiving none, except that he had been home ill. After the test had been completed, the bottles and the contents were seized.

The above facts present the ultimate in unreasonable search and seizure. A judicial decision has not been found where government agents arrogated to themselves authority to enter a retailer's place of business and under the guise of routine inspections abstract and destroy a portion of the contents of bottles for a test. By the very circumstances of such a method of inspection it is apparent that no crime was being committed in the presence of the officers.

Following the procedure approved in *Taylor v. United States,* 286 U.S. 1, 76 L. ed. 951, 52 S. Ct. 466, the defendant filed a timely petition to suppress the testimony so obtained. Motion to exclude the evidence on the ground that the search was without a warrant was made during the trial and denied. It is respectfully submitted the motion to suppress testimony and return the property and the motion to exclude evidence should have been granted.

The foundation of the right against unlawful search and seizure and the protection offered by the Fourth and Fifth Amendments are stated in *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 357, 75 L. ed. 374, 382, where the court says as to the Fourth Amendment:

> "It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent * * *. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty.

> They are denounced in the constitutions or statutes of every state in the Union. Agnello v. United States, 269 U.S. 20, 33, 70 L. ed. 145, 149, 51 A.L.R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and the present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U.S. 616, 623, 29 L. ed. 746, 748, 6 S. Ct. 524; Weeks v. United States, 232 U.S. 389-392, 58 L. ed. 654, 655, L.R.A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, supra."

A gradual depreciation of the protection granted by the Fourth Amendment will not be given judicial sanction by stealthy encroachment. As said in *Byars v. United States,* 273 U.S. 28, 47 S. Ct. 248, 71 L. ed. 520:

> "The Fourth Amendment was adopted in view of the easy misuse of power in the matter of search and seizures both in England and the colonies, and the assurance of any revival of it, so carefully embodied in the fundamental law is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality, but which, in realty, strike at the substance of the constitutional right."

The protection of the amendment extends to offenders as well as the law abiding. (*United States v. Lefcowitz,* 285 U.S. 452, 76 L. ed. 77; *Welles v.*

United States, 232 U.S. 383, 58 L. ed. 652, LRA 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177.)

While the courts have refused to lay down a formula for the determination of what is reasonable (*Go-Bart Importing Co. v. United States, supra*), a ready test of a citizen's minimum right is to determine if the information possessed by the officers would be sufficient to constitute grounds for obtaining a search warrant for the premises. As a search warrant can be issued only on probable cause, and the right to search and seize without a warrant depends upon the commission of a crime in the presence of an officer, quite obviously if the facts at the time of the search would be insufficient to authorize the procurement of a search warrant, no claim can be made that the facts authorize a search and seizure without a warrant.

The records show that the officers were in the city of Sacramento a short distance from the Post Office Building where there is regularly sitting a district judge and a federal commissioner. There were two officers. A legitimate inquiry is: If the officers had probable cause to believe that an offense was being committed at ten o'clock in the morning of a business day, why did not one of the officers stay at the business premises to see that no evidence was destroyed, while the other walked or drove the short distance to the Post Office to procure a warrant? The fact that they did not in and of itself shows that no probable cause existed. As said by Judge Learned Hand in *United States v. Kaplan,* 89 Fed. (2d) 869, at

page 871, in holding void a search without a warrant sought to be justified upon the basis of smell:

> "Any community must choose between the impairment of its power to suppress crime and such evils as arise from its uncontrolled prosecution, but the danger is not certain, for the officers could have applied for a warrant * * * it takes time to break up a still and take the parts away; if the attempt were made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or commissioner whose actions would at least have put a different face on the proceedings."

But in the instant case the officers had no probable cause. They were making a general exploratory search and a search warrant would have been denied. A search warrant may issue only upon evidence which would be competent on the trial of the offense before a jury. (*Grace v. United States,* 287 U.S. 124, 77 L. ed. 212, 53 S. Ct. 38.) The agents had no evidence until the "tests" of each particular bottle were completed.

Merely because the defendant had a business requiring the keeping of records, gave no authority, other than to make routine inspections. In the argument on the motion to exclude evidence counsel for the government attempted to justify the search and seizure under paragraph (a) of Section 3601 of the Internal Revenue Code. This section authorizes entry in the daytime by internal revenue agents of any building where articles subject to tax are made or kept and to examine the articles. The powers and limitations of an agent under Section 3601 (a) were discussed

in the case of *United States v. Frisch* (CCA 5th, 1944), 140 F. (2d) 660.

In the *Frisch* case, officers concluded from examination of a bar that a false return had been made in making the inventory of liquor for floor tax purposes. This information was confirmed by breaking open a desk in the liquor bar and taking records. On retiring to a stairway outside the bar, they heard a noise upstairs and, on investigation, after breaking in a closet door, they found additional liquor and arrested the owner for the offense of evading the floor tax on liquors.

The court held that Section 3601 gave the officers the right to inspect the books required to be kept by a retail liquor dealer, and also the right to *see and count* the taxed liquor; but this was the maximum of their authority under Section 3601. The court held if additional search was necessary or required, they should have applied for a search warrant under Section 3602 of the Internal Revenue Code. The court said:

> "As a retail liquor dealer, Frisch was bound to keep records concerning his stock which the officers had a right to see. Internal Revenue Code, Section 3252, and under Section 3601, we think they had a right to see and count the taxed liquors in the bar and the closet adjoining it. (140 F. 2d 660, at 662)."

The court held in the *Frisch* case that further searches without a warrant, other than to look and to count were unlawful and ordered that the evidence so obtained be suppressed and the articles returned.

Other cases hold the mere fact that the defendant must be licensed to conduct the business does not give officers the right to make general or exploratory searches. See *In re Lobasco,* 1926 D.C., 11 F. (2d) 892, holding that a prohibition agent who entered a drugstore for the purpose of examining records had no authority to enter a part of the store marked, "Private"; *United States v. Kozan,* 1930 D.C., 37 F. (2d) 415, holding unlawful search of drugstore made in absence of owner.

Likewise, the lack of objection upon the part of the bartender did not constitute consent. In the case of *United States v. Ruffner* (D.C. Md., 1931), 51 F. (2d) 579, it was held that an employee could not bind an owner by consenting to searching of premises for liquor in the absence of the owner. The court said:

> "The agents apparently knew that Ruffner was the owner and Switzer only an employee; and they also knew or could readily have learned, that the owner was nearby. There was not such required haste in making the search as to preclude consulting the owner in person for permission. The Government did not undertake to prove that Switzer had in fact authority from Ruffner to permit the search. And, in the absence of such proof, the circumstances do not justify the application of the doctrine of apparent authority seemingly relied upon by the government," (51 F. 2d 579, 580. See also Cofer v. United States, 37 F. 2d 677, 679, holding that a wife is without authority to bind her absent husband by consenting to an unauthorized search; and Amos v.

United States, 255 U.S. 313, 317, 41 S. Ct. 266, 65 L. ed. 654, where the Supreme Court found it unnecessary to determine the question because of the implied coercion on the part of the agents affecting the wife.").

Likewise, in *Farris v. United States* (CCA 1st, 1928), 24 F. (2d) 639 (certiorari denied in 277 U.S. 607, 72 L. ed. 1012, 48 S. Ct. 602), the court held there was no consent where the officers entered the house without a search warrant, stated they were there to make a search, to which the defendant replied, "All right, you will find nothing here now."

As in the instant case, the court in the *Farris* case stated that from the evidence it was plain that the search would have been made in all events.

See also *United States v. Marra* (1930 D.C.), 40 F. (2d) 271, where the court held that after prohibition agents had come to the door and stated that they were going to inspect the premises, the defendant could not be said to have consented to the search by saying, "All right".

From the cases, it is apparent that the owner not consenting and no crime being committed in the presence of the officers, the search and seizure made by the government agents was unreasonable and violated the constitutional rights of the defendant. The petition to suppress evidence and return property made prior to trial and the motion made during the trial to exclude evidence based on unlawful search and seizure were proper and should have been granted. It was error to deny the same.

POINT 4.

THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER OBJECTION, BOTTLES AND THE CONTENTS THEREOF, OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE.

This is in substance the same error as resulted from admitting testimony based upon the unlawful search and seizure considered under Point 3, and reference is made to the portion of this brief covering Point 3 for argument as to this error.

POINT 5.

THE COURT ERRED IN ADMITTING INTO EVIDENCE, WITHOUT PROPER FOUNDATION, OVER OBJECTION, BOTTLES AND THEIR CONTENTS.

The bulk of the testimony in this case consists of identification by the witness Sanderson of the 31 bottles of liquor seized, which covers from page 66 to 86 of the printed record, and the testimony introducing these bottles into evidence by the witness Dr. Love, which required over fifty of the pages of the printed record, pages 114 to 168.

The witness Sanderson stated that he had tested the contents of the bottles with the "Williams' Test Set". However, there is nothing in the evidence to indicate the results of such test.

The technical testimony on the contents of the bottles came from the government witness, Dr. Love, chemist for the Internal Revenue Bureau. The doctor testified that he had received the bottles from Mr. Sanderson and tested the contents for proof,

acids, solids and color. (Printed record, pages 116 to 118.) These tests were made against a control bottle, a control bottle being defined as an unopened bottle of the same brand as the one in question and a comparison was made between the contents of one of the bottles seized and the control bottle of that particular brand. (Printed record, page 118.)

After testifying to the contents of the solids, departure was made from legitimate confines of expert testimony to the extent that the witness Dr. Love was authorized over objection to testify as a matter of opinion to the ultimate fact in the case as to each one of the 31 bottles, i.e. that in his opinion the bottles were refilled. This was error.

Objection was made to this character of testimony as shown by the printed record at pages 119, 120, 127, 129, 130, 132, 133, 134, 135, 142, 143.

The character of the objections and the nature of the testimony are all summarized in the testimony given by the witness on re-direct examination as shown by the following portion of the record:

> "Q. In other words, as to every bottle, you have been examined about today, it is your opinion as an expert that every bottle—in other words, from number 149415 to 149445 inclusive—is a refilled bottle, is that correct?
>
> A. Yes, sir.
>
> Mr. Kennedy. Objected to as calling for a conclusion of the witness, and leading and suggestive.
>
> Mr. Seawell. I am asking for his opinion as an expert witness.

Mr. Kennedy. Ask him what his testimony is, Mr. Seawell, don't tell him. Let him speak for himself.

Mr. Seawell. Q. I will ask you this then, put the question this way, doctor: In your opinion, were all the bottles, number 149415 to 149445, which are Government's Exhibits 1 to 31, inclusive, refilled bottles?

Mr. Kennedy. Objected to as calling for a conclusion of the witness on a vital issue, involved in the case.

Mr. Seawell. In your opinion, based on an analysis of each and every bottle, as an expert witness, is that true?

Mr. Kennedy. Same objection, your Honor.

The Court. What is the question?

Mr. Seawell. I have asked him in his opinion —I have asked him about a number of bottles— I am simply doing it to save time—he has testified as an expert witness to a number of bottles, but I think in trying to hurry this morning I eliminated two or three bottles, and I am simply asking him if, in his opinion as an expert witness, after examining each and every bottle he has referred to, if in his opinion all the Exhibits 1 to 31, are refilled bottles.

Mr. Kennedy. Object to on the same grounds.

The Court. Overruled.

A. It is my opinion, yes, sir."

(Printed record, pages 167, 168.)

The error in the nature of this testimony is shown on cross-examination. Dr. Love testified that there were variations in the control bottles of the same brand. (Printed records, page 146.) That insofar as

proof of the contents of whiskey is concerned, if left in an open container long enough the proof would disappear entirely. (Printed record, page 149.) That there is difference in the same brand of whiskey depending on the mash used, or the district where the grain came from and all these factors have to be taken into consideration. (Printed record, page 150.) That the witness was not at the distilleries when the bottles introduced into the evidence were filled and he had no knowledge of what went into the bottles. (Printed record, page 151.) That insofar as Exhibit 31 was concerned, he would not say it was not Scotch whiskey, it was in his opinion not all Black Label Scotch Whiskey. (Printed record, page 159.) That the proofs on control bottles would vary 1%, that is where the proof on the label was 86.81 it would vary from 87.81 to 85.81 and that he could give no statement as to what the variation in controls, in solids would be, on Johnnie Walker Scotch. (Printed record, page 156.) The same was true of acids, that the variation would be small, but he could give no actual figures (Printed record, page 157), and acids (Printed record, page 160), and color (Printed record, page 162).

With the witness showing on cross-examination that he was depending upon a very variable factor in the control bottles on which to base his opinion, it was extremely prejudicial to allow him to give his opinion as to the ultimate fact to the jury to decide, i.e., were the bottles refilled? *United States v. Spaulding,* 293 U.S. 498, 79 L. ed. 617, 55 S. Ct. 273. It was prej-

udicial error to evade the jury's province and take conclusions under the guise of expert testimony as to the ultimate issue in the case.

POINT 6.

THE COURT ERRED IN ADMITTING OVER OBJECTION TESTIMONY AS TO THE STATEMENT OF A CO-DEFENDANT PRIOR TO THE ESTABLISHMENT OF THE CORPUS DELICTI.

The government witness, Sanderson, identified for the record, the 31 bottles seized on July 18th, without any statement as to what was in the bottles or their contents when he was asked the question whether or not he had a conversation with the defendants in regard to the refilling of these bottles. Thereupon the following proceedings are shown of record:

> "Q. And what was said by yourself and what was said by Mr. Maritsas in regard to the refilling of any of these bottles?
>
> A. I talked—
>
> Mr. Kennedy. Just a moment, if your Honor please. Objected to on the ground it calls for hearsay testimony—
>
> Mr. Seawell. Calls for what?
>
> Mr. Kennedy. —and there is no proof of the corpus delicti.
>
> Mr. Seawell. May it please the Court—
>
> Mr. Brannely. Your Honor, I make the same objection on behalf of Mr. Legatos, any statement made by any defendants are not admissible in evidence until the corpus delicti has been established. We base our objection on that ground.
>
> The Court. Overruled.

Mr. Seawell. Will you proceed?

Mr. Kennedy. Further your Honor, there is no proper foundation.

The Court. Overruled.

Mr. Seawell. Go ahead, Mr. Sanderson."

(Printed record, pages 88 and 89.)

The witness then proceeded to relate the conversation he had had with Maritsas wherein Maritsas admitted that he had put rum in 14 of the bottles.

The evidence was not admissible for the reason that the *corpus delicti* was not shown. In *Gordiner v. United States* (CCA 9th, 1920), 261 Fed. 910, the defendant was convicted of failure to submit to registration under the Selective Draft Act of 1917. The whole evidence against him consisted of affidavits made by him as to his age. He contended the evidence was insufficient for the reason that the affidavits constituted admissions by him and must be corroborated by independent testimony. The Ninth Circuit Court agreed and stated:

> "The plaintiff in error contends that no corpus delicti was shown and that it was error to admit the affidavits in evidence whether they be regarded as admissions or confessions and relies upon the rule which has been recognized in the courts of the United States that to sustain a conviction some sort of corroboration of the confession or admission is necessary."

On the basis of the rule so cited, the Court reversed the conviction. See also *Martin v. United States* (CCA 2d, 1921), 264 Fed. 950, and *Gullota v. United States* (CCA 8th, 1940), 113 F. (2d) 638.

So also the confession of a co-defendant is not admissible against the accused, in this case the defendant Legatos, to establish the *corpus delicti.* (22 CJS 1330, *Williamson v. State* (Ala.), 186 So. 785; *State v. Richetti* (Mo.), 119 S. W. (2d) 330, 342 Mo. 1015.) It was therefore error in view of the objections made for the court to admit the testimony of the confession by Maritsas as to the *corpus delicti* was not proved.

POINT 7.

THE COURT ERRED IN ADMITTING, OVER OBJECTION, HEARSAY TESTIMONY AND OPINION EVIDENCE OF THE GOVERNMENT WITNESS, LAVERNE LEWIS, AND IN ALLOWING THE GOVERNMENT ATTORNEY TO CROSS-EXAMINE SUCH WITNESS.

The witness Laverne Lewis, was a witness called by the Government. On direct examination she testified as to a conversation she had had with Tony Legatos about February 1, 1944, in reference to him disposing of some forty or fifty cases of rum that were located in the Log Cabin Tavern, a place owned by Legatos. (Printed record, page 170.) Legatos said, "I have got 40 or 50 cases here and I am going to move it and press the sales." (Printed record, page 171.)

On cross-examination, the witness testified that the rum was taken to other places. (Printed record, page 174.) That he never said anything about mixing the rum with whiskey and the witness did not want to convey that idea. (Printed record, page 176.) That

the witness knew of her own knowledge that Legatos insisted that his place be operated according to law. (Printed record, page 176.)

After this direct and cross-examination, the following redirect examination took place:

"Q. Did you talk to Mr. Legatos?

A. Yes.

Q. And Mr. Brannely?

A. Yes.

Q. Is that what caused you to change your story before the Court today?

Mr. Brannely. Just a moment. There is no indication this witness changed her story, and I ask your Honor to instruct the jury to disregard the purport of that question.

Mr. Seawell. I will withdraw the question and proceed with another question.

Q. Didn't you tell me, in the presence of Mr. Sanderson yesterday in my office, and in the presence of my stenographer that in your opinion Mr. Tony Legatos did not operate his business in a legal manner—

Mr. Brannely. Just a moment.

Mr. Seawell. Just a moment, let me finish my question.

Mr. Brannely. Your Honor—

The Court. Just a moment. There is the place (Indicating) not all around the court room.

Mr. Brannely. Yes, and I desire, your Honor, on behalf of my client, Mr. Legatos—

The Court. There is no reason to get exercised——

Mr. Brannely. —to object to that question on the ground it is improper redirect examination

and it is an attempt to cross-examine his own witness.

Mr. Seawell. That is correct, and I am laying the foundation for having been taken by surprise.

The Court. Overruled. Go ahead.

The Witness. Mr. Seawell, will you ask me the question again?

Mr. Seawell. Q. Didn't you tell me yesterday in my office in the presence of Miss Souza, my stenographer, and Mr. Sanderson, the agent in this case, and myself that Mr. Tony Legatos did not operate his bar in a lawful manner?

A. I didn't say that, I said in a very careless manner.

Q. And didn't you say he knew about the rum being put into these bottles, in your opinion?

A. Yes, I might have.

Mr. Brannely. Well, now, just a moment, Your Honor, I am going to make an objection to protect my client here. He says if in her opinion he knew the rum was put into those bottles. Your Honor, we certainly object to that as being an improper question.

The Court. There is no objection before the Court.

Mr. Brannely. Well, we are making the objection.

Mr. Seawell. Just a minute. May it please the court, Mr. Brannely asked this woman if in her opinion he operated these bars in a lawful manner. Now I am on redirect asking her if she didn't tell me yesterday that in her opinion Mr. Tony Legatos always knew about this rum going into bottles, because he told these men to force this rum and to get rid of it.

Q. Isn't that what you told me?

Mr. Brannely. Just a moment. Your Honor, I object—

The Witness. I said he said to push the rum and brandy sales.

Mr. Seawell. Q. And in your opinion he knew it was being mixed?

Mr. Brannely. Just a moment before you answer the question. We stand on the objection there; it is not a question of her opinion. That is immaterial, your Honor. She is testifying to facts, not what her opinion might be.

Mr. Seawell. That is right.

Mr. Brannely. And we object to it upon the ground her opinion is not testimony in this case and it is incompetent, irrelevant and immaterial. We stand upon that objection, your Honor.

Mr. Seawell. I would never have asked the question if you had not asked her if in her opinion—

Mr. Brannely. I didn't ask for any opinion.

Mr. Seawell. Let me finish. If in her opinion he ran the business in a lawful manner.

Mr. Brannely. I didn't ask for an opinion. I asked if she knew as a fact.

The Court. Proceed.

Mr. Seawell. That is all."

(Printed record, pages 177, 178 and 179.)

From the above testimony the government attorney was apparently trying to induce the jury to believe that the witness Mrs. Lewis had told an entirely different story on the witness stand than she had told the United States District Attorney in his office and to insinuate that Legatos through connivance had at-

tempted to have the woman change her testimony. The fact that the United States attorney asked questions which were left unanswered and left improper insinuations in the record implying that the defendant had acted improperly is amply supported by his closing argument to the jury. In his closing argument, he stated:

> "He talks about Mrs. Lewis, why did Mrs. Lewis—Mrs. Lewis came here in answer to subpoena from my office and she says, 'I was duty bound and Legatos was duty bound,'—I am not accusing Mr. Brannley, because I know he is a high type of attorney and I know he couldn't do anything wrong, and he was perfectly within his rights to talk to her—not only Mr. Brannely talking to her, I talked to her, *and it wasn't apparently the same story she told me before when she took the stand.*"
>
> (Printed record, page 233.)

Berger v. United States, 295 U.S. 78, 79 L. ed. 1314, 55 S. Ct. 629, directly applies to the above improper character of examination and argument. Prejudice of a high degree was created against the defendant by the improper cross-examination and exaction of hearsay and opinion testimony as to the guilt of the defendant from the government's own witness. Particularly prejudicial were the questions implying that the witness had changed her story at the behest of the defendant Legatos. It is submitted that under the rule of the *Berger* case, the testimony comes within the definition of "improper suggestions, insinuations, and especially, assertions of personal knowledge" designed

"to carry much weight against the accused when they are properly mere opinion".

It is respectfully submitted that prejudicial error was committed in allowing such questions to be asked.

POINT 8.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE.

At close of testimony, defendant made a motion for judgment of acquittal and this was denied. (Printed record, page 215.)

A discussion of this would be identical with that under Point 9, at pages 51 to 62 of this brief, and reference is made to this discussion of Point 9 for consideration of Point 8.

POINT 9.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE TAKING OF TESTIMONY IN THE CASE.

Points 8, 9 and 12 in the Statement of points on which appellant intends to rely on appeal, relate to the sufficiency of the evidence to prove a criminal act under the first count of the indictment and as such they may be treated together.

Section 2871 of the Internal Revenue Code requires a willful violation to offend the section; Section

175.41 of Regulations 13 prohibits re-use for the packaging of distilled spirits or the additions of substance to the original contents of liquor bottles. The gist of the argument to follow is that as the record shows that Tony Legatos was not the actor in refilling bottles, he cannot be held liable for the acts of his employee, done without his knowledge or consent, and there was a total failure of evidence to prove either a criminal act or intent.

Pursuant to Rule 29 of the Federal Rules of Criminal Procedure at the close of the evidence offered by the government and at the close of taking of testimony, motions for judgment of accquittal were made on behalf of the defendant. These motions were denied. (Printed record, pages 183, 215.) Further, after the verdict of the jury and prior to sentence, pursuant to Rule 29(b), a written motion for a new trial was filed and in the alternative a renewal of the motion for acquittal. These motions likewise were denied. (Printed record, page 19.)

The instant case has several unusual features. First, no fraud on revenue was committed nor is it suggested—Chris Maritsas, the employee, testified, and the testimony is uncontradicted, that the rum that went into the whiskey bottles came from tax paid bottles. (Printed record, page 198.) The other peculiar fact is that the government contends ownership of an establishment automatically convicts the owner for any acts of refilling committed in the owner's establishment.

Unquestionably it is the theory of the government that an owner is liable for refilled bottles found on his premises—that it is not necessary to prove act or intent. The argument of counsel for the government makes it clear that it is the government's position that neither intent nor any act other than that of owning the premises was necessary to subject the defendant to the penalties of the statute.

In his argument to the jury, the United States attorney prosecuting the case stated:

> "In other words, I think the Court will instruct you that even though I did not produce Mrs. Lewis and even though I could not directly connect this defendant with the crime, that if he owned the bar—he is the sole owner of the bar—he is licensed to carry on a business in this town, he is in a different position than the average business man, he is licensed by the United States Government and by the State of California to carry on a lawful business, and when you are licensed to carry on a licensed business, you owe a higher duty to the public generally. You are operating under a license and it is your duty to see that the business is carried on in a lawful manner." (Printed record, pages 225, 226.)

Again in his closing argument on behalf of the government, counsel for the government stated to the jury:

> "Mr. Brannely has discussed the law on this, and I would like to discuss it and I have read to you about what the law is about the proof of guilt in this case.

> *It is only necessary to prove this defendant owns and operates the place in question."* (Printed record, page 230.)

This argument overlooks the elementary principle of criminal law that to prosecute a criminal offense there must be an overt act by the party charged. The point is so elementary only the barest authority is cited. (22 *C.J.S.* 95.)

Neither Section 2871 of the Statute, nor Section 175.41 of Regulations 13 makes the act of ownership criminal, it is the refilling of bottles for a particular purpose which is made unlawful.

In addition, the statute attaches criminality only to those who "willfully violate" the Section. Willfulness is a statutory factor in the establishment of guilt—a specific intent to violate the law.

In *Screws v. United States,* 325 U.S. 91, 89 L. ed. 1495, 65 S. Ct. 1031, the court said that "willful" is a word of many meanings whose construction is often influenced by the context in which it is used. As said by the court, at page 1502:

> "We recently pointed out that 'willful' is a word of 'many meanings, its construction often being influenced by its context'. Spies v. United States, 317 U.S. 492, 497, 87 L. ed. 418, 422, 63 S. Ct. 364. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, 78 L. ed. 381, 384, 54 S. Ct. 223, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois C.R. Co. 303 U.S. 299, 82 L. ed. 773, 58 S. Ct. 533. But 'when used

in a criminal statute it generally means an act done with a bad purpose.' Id. 290 U.S. p. 394, 78 L. ed. 384, 54 S. Ct. 223. And see Felton v. United States, 96 U.S. 699, 24 L. ed. 875; Potter v. United States, 155 U.S. 438, 39 L. ed. 214, 15 S. Ct. 144; Spurr v. United States, 174 U.S. 728, 43 L. ed. 1150, 19 S. Ct. 812; Hargrove v. United States (CCA 5th) 67 F. (2d) 820, 90 ALR 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250, 66 L. ed. 604, 42 S. Ct. 301. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra (174 U.S. p. 734, 43 L. ed. 1152, 19 S. Ct. 812); United States v. Murdock, supra (290 U.S. p. 395, 78 L. ed. 385, 54 S. Ct. 223). And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 314 U.S. 513, 524, 86 L. ed. 383, 390, 62 S. Ct. 374.

An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts."

(89 U. S. 91, 101.)

So also in *Spies v. United States,* 317 U.S. 492, 87 L. ed. 418, 63 S. Ct. 364, the court held, where the defendant was indicted on a felony charge of "willful failure" to file a tax return and "willful failure" to pay taxes in an attempt to defeat and evade income taxes, that it was not sufficent to show that the act was merely voluntary and purposeful on the part of the taxpayer. It was necessary to show something

more—wilfullness as used in the statute included some element of "evil motive".

Or, as said in *United States v. Murdock* (1933), 209 U.S. 389-398, 78 L. ed. 381, 54 S. Ct. 223:

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. (Felton v. United States, 96 U.S. 699, 24 L. ed. 875; Potter v. United States, 155 U.S. 438, 39 L. ed. 214, 15 S. Ct. 144; Spurr v. United States, 174 U. S. 728, 43 L. ed. 1150, 19 S. Ct. 812); without justifiable excuse (Felton v. United States, supra; Williams v. People, 26 Colo. 272, 57 Pac. 701; People v. Jewell, 138 Mich. 620, 101 N.W. 835; St. Louis I.M. & S.R. Co. v. Batesville & W. Teleph. Co. 80 Ark. 499, 97 S.W. 660; Clay v. State, 52 Tex. Crim. Rep. 555, 107 S.W. 1129); stubbornly, obstinately, perversely, Wales v. Miner, 89 Ind. 118, 127; Lynch v. Com. 131 Va. 762, 109 S.E. 427; Claus v. Chicago G.W.R. Co. 136 Iowa, 7, 111 N.W. 15; State v. Harwell, 129 N.C. 550, 40 S.E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful. (Roby v. Newton, 121 Ga. 679, 49 S.E. 694, 68 L.R.A. 601), or conduct marked by careless disregard whether or not one has the right so to act, United States v. Philadelphia & R.R. Co. (D.C.) 223 Fed. 207, 210; State v. Sayre, 129 Iowa, 122, 105 N.W. 387, 3 LRA (N.S.) 455, 113 Am. St. Rep. 452; State v. Morgan, 136 N.C. 628, 48 S.E. 670." (290 U.S. 389, 394, 78 L. ed. 381, 385.)"

Thus the decisions compel a construction of Section 2871 of the Internal Revenue Code that there can only be a violation when the defendant commits the acts condemned by the rule with the evil motive of violating the section and the purpose for which it was enacted. In other words, that bottles were refilled with the intent to deprive the government of revenue.

As to the purpose of the statute, this may be gathered from *United States v. Bardenheir* (1892), 49 Fed. 873, where the court construed Section 3226 Revised Statutes, now Section 2868 of the Internal Revenue Code, and held an indictment fatally defective charging a use of cask or packages for the sale of spirits of a different quality from those contained in them at the time of the inspection, without alleging the cause of the change: "It is apparent that Congress was legislating for the protection of the revenue, rather than merely the prevention of private wrongs". See also *Three Packages Distilled Spirits* (D.C. N.Y. 1882), 14 Fed. 569.

In the instant case therefore, it is proper to interpret the word "willful" in Section 2871 to require proof of the evil motive to defraud the government of revenue along with proof of the act. Such a determination is not necessary in this appeal for the reason that the *minimum* meaning of willful in any statute, according to all adjudicated cases, is that it connotes and requires an intentional and purposeful act, and unless such an act is shown there can be no criminality.

No employer is liable for the criminal acts of his employee in the absence of proof that the employer participated in, consented to or had knowledge of the acts.

In the instant case, the government's basic contention was that the same rule applies in criminal law as applies in civil law, i.e., a principal is bound by the acts of his employee or agent performed within the scope of the employee's or agent's authority. But this is a rule of civil liability only and is not part of the criminal law.

The entire matter and all of the applicable authorities were cited and discussed by District Court Judge Yankwich in an exhaustive analysis in the case of *United States v. Food and Grocery Bureau of Southern California* (1942), 43 Fed. Supp. 966. In the *Food and Grocery* case, the court held that as a matter of law certain defendants were not criminally liable for the acts of an agent for want of proof of direct authorization by the principal, irrespective of the fact that the agent may have been acting within the scope of his employment. The court, in analyzing the authorities and the applicable law, at page 971 of 43 Fed. Supp., said:

> "Another principle of law to which I adverted during the early stages of the case was the criminal responsibility of a principal for the acts of his agent. I quote from my opinion in People v. Armentrout, 1931, 118 Cal. App. Supp. 761, 1 P. 2d 556, 561: 'A principal, in order to be held criminally liable, must be shown to have knowingly

or intentionally aided, advised, or encouraged the criminal act committed by the agent.' People v. Doble, 203 Cal. 510, 511, 265 P. 184. 'Before one can be convicted of a crime by reason of the acts of his agent, a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law.' People v. Green, 22 Cal. App. 45, 50, 133 P. 334. * * * Only when the principal aids, abets, commands, or assents to the criminal act can he be held responsible for a crime of which intent is an essential ingredient which is not supplied by law or implied from the doing of the act. * * * Strictly speaking, there can be no ratification of a criminal act in which a specific intent is necessary. 'He (the principal) must be liable, if at all, at the time the act is done.' Clark & Marshall on Crimes (3d Ed.) Sec. 194, p. 255. 'He only is criminally punishable who *immediately* does the act, or *permits it* to be done.' Rex v. Huggins, supra, at p. 1580 of 2 Ld. Raymond.''

In Nobile v. United States, 3 Cir., 1922, 284 F. 253, 255, the Court said: 'Criminal liability of a principal or master for the act of his agent or servant does not extend so far as his civil liability. *He cannot be held criminally for the acts of his agent, contrary to his orders, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly.'* (Italics added by Judge Yankwich.)

And thus Paschen v. United States, 7 Cir., 1924, 70 F. 2d 491, 503: '* * * civilly one is

> responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he intentionally does that which the law denounces and penalizes. Nobile v. United States (3 Cir.), 284 F. 253.' "

The above case states the universal rule on criminal liability where a specific intent is required to the completion of the criminal act. In these cases, "Unless there be command, direction, or consent by the principal, he commits no offense." (*Paschen v. United States,* supra.)

In the instant case there was a total failure of proof, and, apparently the government concedes that Tony Legatos committed no act of refilling. Likewise there is a total failure to prove that the defendant Legatos had any knowledge of the acts of his employee or that he consented thereto or participated in any way in any act of refilling, there being no act on the part of the defendant Legatos and there being no conduct on his part from which it could be implied that he commanded, directed or consented to the act of his employee Maritsas. The proof is to the contrary and the testimony clear and unequivocal that Legatos had no knowledge.

There is the positive testimony of Maritsas that defendant Legatos knew nothing of any refilling. (Printed record, page 202); Legatos testified he knew nothing about it. (Printed record, page 205.) The only attempt made by the government to connect Legatos

with the refilling (other than ownership) was proof of a conversation he had on February 1, 1945 (five months before the offense) that in one establishment he had forty or fifty cases of rum and he intended to send it to his other establishments and ask each of his managers "to press it in their sales". (Printed record, page 171.) But this conduct is consistent with innocence; the defendant would not be a businessman if he did not adapt his sales practices to his inventories.

Again there is the highly prejudicial hearsay testimony of the government witness Laverne Lewis, that in a conversation with the prosecuting attorney, *she might have said* that *in her opinion* Legatos knew that rum was put into the bottles. (Printed record, page 178.) But this was not testimony, this was separate grounds of error. Such rank hearsay of an "opinion" cannot be given the dignity of testimony in a case wherein the defendant's liberty was at stake.

There being a total failure of proof and the motions for judgment of acquittal being timely made under Rule 29, the defendant was entitled to have such motions granted. *Hammond v. United States* (D.C. Appeals, 1942), 127 F. (2d) 752, unequivocally sets forth the rule of law as to the rights of the defendant and the duty of the court where there is insufficient evidence to overturn the legal presumption of innocence. The court said:

> "In the present case, there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved

> guilty beyond a reasonable doubt. 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment against him'."

The mere fact that the circumstance of ownership might give reason to suspect the defendant Legatos of complicity is not sufficient evidence to convict.

> "Circumstances which merely raise supposition or give room for conjecture are not sufficient evidence of guilt. Wharton on Evidence, page 1532. 'A conviction resting on them alone cannot stand.' Kassen v. United States, 87 Fed. 2d 183, 184."
>
> *Dennert v. United States* (CCA 6th, 1945), 147 Fed. (2d) 286.

The entire record in the case, read in the light most favorable to the Government, failing to show the commission of a criminal act required that the court at the conclusion of the taking of testimony should have granted defendant's motions for judgment of acquittal.

POINT 10b.

THE COURT ERRED BY INSTRUCTING THE JURY THAT SECTION 2871 OF THE INTERNAL REVENUE CODE REQUIRED NO INTENT TO CONSTITUTE A VIOLATION.

The instruction was:

> "You are instructed that the offense charged in this indictment as against Tony Legatos is of that class in which it is not necessary to prove guilty intent. This defendant, being engaged in the business of selling distilled spirits which had been bottled while in bond, whether he conducted it by himself or his agent, was bound at his peril to see that there was no re-use of any bottle for the purpose of containing distilled spirits, which had once been filled and stamped under the provisions of the Act in question, without removing and destroying the stamp previously affixed to such bottle. If the bottles in question were refilled, they have been re-used. Agents of the defendant Tony Legatos, if one of them acting—I will go over this again.
>
> If the bottles in question were refilled, they have been re-used. If one of the agents of the defendant Tony Legatos, acting within the scope of his employment, re-used the bottle without removing and destroying the stamp, then this defendant's liability is the same as if he had re-used it himself."

The instruction appears three times in the printed record, at pages 256, 264 and 265.

Objections to the instruction appear at pages 262, 263, 267 and 268 of the printed record.

The above point also covers Point 10c, which is set out in the Statement of Points on which defendant intends to rely on Appeal and is worded:

> "The court erred by instructing the jury that irrespective of the lack of knowledge of the employer, the defendant could be held criminally liable for the acts of his employee."

It is the same instruction.

Section 2871 of the Internal Revenue Code prohibits "willful violations". The preceding discussion on the sufficiency of the evidence set out the authorities on the necessity of a specific act and a specific intent under this statute where "willfullness" is made an ingredient of the crime. In the same portion of the argument the authorities were reviewed to the effect that an employer is not liable criminally for the acts of his employee in the absence of a showing that the employer participated in, consented to or had knowledge of the acts. Also, it was made evident that the theory of the government's case, making mere ownership of an establishment where liquor bottles were refilled a criminal act, was false.

All of the above authorities and the discussion presenting them is equally pertinent to the point of error in the instructions to the jury. For, in the instructions to the jury, and the refusal of instructions, the theory of the government, that guilt is founded on ownership, culminated as the law of the case. The giving of the questioned instruction and the manner of giving it compelled the jury to render a verdict against the de-

fendant. The discussion as to the legal meaning of willfulness in a statute will not be repeated—neither will the authorities to the effect that the doctrine of *respondeat superior* has no place in criminal law. Suffice it to state the discussion of these points under the argument on the insufficiency of the evidence to prove a violation makes it patent that the instruction given by the court that it was not necessary to prove guilty intent was error. The argument under this head will restrict itself to the origin of the instruction and the error present in the manner of giving it to the jury.

The instruction given by the court is lifted bodily from the case of *In re Guthrie* (Dist. Ct. Ohio, 1909), 171 Fed. 528 and consists in *part* of an instruction given by the trial judge to a jury.

The essential portion of the instruction given in the *Guthrie* case, omitted in the Legatos case is:

> "The question has arisen: Is it necessary on the part of the government, in order to convict, to show that the defendant knowingly and wilfully reused the bottle? On that point I charge you that: The clause of the statute under which the indictment is laid does not make the criminality of the act forbidden to depend upon its being knowingly or willfully done, and the government is not therefore required to prove that he reused a bottle knowingly and willfully." (171 Fed. 528, 531.)

The court in the *Guthrie* case was correct on the statute, Section 6 of the Act of March 3, 1897, Chapter

379, 29 Stat. 627. The clause involved in the *Guthrie* case did not require that the violation be willful. That is sufficient distinction to prohibit the language of the *Guthrie* case ever being used as an instruction where the statute requires "willfullness" as an essential element of the offense.

Not only the wording of the instruction, but the manner in which it was given and its repetition were prejudicial to the defendant, and left the jury no possibility of doing anything except to bring in a verdict against the defendant Legatos.

The trial of the case occupied three days. The jury on the fourth day were instructed, and at 10:46 A.M. retired for the purpose of considering the verdict. (Printed record, page 263.) At 2:10 P.M., the jury returned to the courtroom and the Foreman handed the following writing to the judge:

> "Judge Welsh. Your instruction to the jury with reference to the responsibility of an employer for the acts of employee is not clear to all of the jurors.
>
> Respectfully, N. M. Sellers, Foreman."
>
> (Printed record, page 264).

Without further proceedings, the court reread to the jury the identical instruction previously given that "as against Tony Legatos * * * it is not necessary to prove guilty intent", and that Tony Legatos was bound at his peril for the acts of his employee.

The jury retired at 2:15 P.M. and again returned at 4:55 P.M. (Printed record, page 264.)

The Foreman then presented a second note to the judge. The proceedings are taken from the record:

"The Court. There was presented to me the following:

'Judge Welsh. We previously asked you can an employer be held responsible for the acts of an employee. Your answer was that an employer can be held responsible for the acts of an employee. We now wish to ask is an employer responsible for the acts of an employee, even if the employee violates the law against the knowledge and consent of the employer?

Respectfully, N. M. Sellers, Foreman.'

Mr. Foreman, will you please state numerically, without divulging which way either for conviction or acquittal, how you now stand?

Juror Sellers. We stand eleven to one, your Honor.

The Court. The answer is this * * *" (Printed record, page 265.)

The court thereupon reread the same instruction as had twice previously been given. After reading the instructions the following proceedings are shown of record:

"Mr. Brannely. Your Honor, at this time—

Mr. Seawell. Just a moment, any motion?

The Court. Denied. You may now retire.

(The jury commenced to retire from the court room.)

Mr. Brannely. Your Honor—

Mr. Seawell. Just a moment—

The Court. Wait a minute do you understand?

(The jury retired from the court room.)
The Court. Now what do you wish to say?"
(Printed record, page 266.)

After being permitted to address the court, counsel for the defendant stated their objections to the instruction as given; that the jury must find intent. The response of the court to the objection of counsel was: "Let it stand as it is". (Printed record, pages 266-268.) The jury after being out approximately ten minutes, returned with a verdict of guilty on the First Count. (Printed record, page 268.)

The confusion of the jury on the questions of intent and the liability of an employer for the acts of his employee was so apparent from the jury's queries the only conclusion possible is that the instruction repeated by the court was decisive of the case and amounted to a direction to the jury to return a verdict of guilty against the defendant.

The case in its procedural aspects, with the circumstance of the jury coming into the court for instructions, the court plainly hinting that a verdict should be forthcoming, so closely parallels *Bollenbach v. United States* (January 28, 1946), 326 U. S. ....., 66 S. Ct. 402, 90 L. ed. (Adv.) 318, as to be on all fours with it.

The *Bollenbach* case involved an indictment for violating the National Stolen Property Act charging in two counts a known transportation in Interstate Commerce of stolen securities and a conspiracy to commit the offense. At the trial of the case it was proved that the securities were stolen in Minneapolis and the de-

fendant helped to dispose of them in New York City. The introduction of evidence took seven days, and after the jury had been out seven hours it reported to the court that it was "hopelessly deadlocked". Some comments were exchanged between the court and the jury, in which one of the jurors asked if an act of conspiracy could be performed after the crime had been committed. The answer of the judge was unresponsive. The jury then retired, but returned in twenty minutes for further instructions. This time the jury passed the court a written note asking if the defendant had knowledge that the bonds were stolen, would such knowledge make him guilty on the second count. In reply the court gave the jury an instruction which included a statement to the effect that possessing stolen property in another State after the theft raises a presumption that the possessor was the thief. Counsel for the defendant excepted to this charge, but was cut short by the judge with the remark: "You may except to the charge, but I will not take any requests". (90 L. ed. (Advance) 320.)

Following that instruction the jury was out for only five minutes before returning with a verdict of guilty on the conspiracy count.

After discussing the error in an instruction which permits the jury to presume a theft, the opinion of the Supreme Court states:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.

Quercia v. United States, 289 U. S. 466, 469, 77 L. ed. 1321, 1324, 53 S. Ct. 698. The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr v. United States,* 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. *If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.*

An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home, and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming. The jury was obviously in doubt as to Bollenbach's participation in the theft of the securities in Minneapolis and their transportation to New York. The jury's questions, and particularly the last written inquiry in reply to which the untenable 'presumption' was given, clearly indicated that the jurors were confused concerning the relation of disposing of stolen securities after their interstate journey had ended to the charge of conspiring to transport such securities. Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevent legal criteria. When a jury makes explicit its difficulties, a trial judge should clear

them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But he was not even 'cursorily' accurate. He was simply wrong." (90 L. ed. (Adv.) 321. Italics added.)

Two other cases in the last term of the Supreme Court follow the decision of the *Bollenbach* case. These are *M. Kraus & Bros. v. United States* (March 25, 1946), 326 U. S. —, 90 L. ed. (Adv.) 653, 66 S. Ct. 705, and *Bihn v. United States* (S. Ct. June 10, 1946), 14 Law Weekly 4449, 90 L. Ed. (Adv.) 1208.

In the *Kraus* case the court was concerned with a conviction for alleged violation of O.P.A. regulations through a practice of requiring purchasers of dressed poultry to buy chicken skins and chicken feet with the poultry. Among other instructions given by the court to the jury was one in which the court advised the jury that the "one question in the case was whether the sale of chicken skin and feet was a necessary condition to the purchase of the other (poultry)".

The Supreme Court held that the regulations involved had to be interpreted strictly and so interpreted did not prohibit a tie-in sale, making the instruction erroneous. However, other instructions given by the trial court did properly interpret the regulation. Nevertheless, the Supreme Court held that the specific instruction constituted irreparable error and that the correct general instructions did not cure the defect. The opinion states:

> "While such statements (the proper instructions) tended to charge a violation of Section 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. 'A conviction ought not to rest upon equivocal direction to the jury on the basic issue'. *Bollenbach v. United States,* 326 U. S. —, 90 L. Ed. (Adv.) 318, 66 S. Ct. 402". (90 L. Ed. (Adv.) 653, 659.)

The other decision and the most recent is *Bihn v. United States,* handed down on June 10, 1946. There the court held that an erroneous instruction on a basic issue of fact could not be cured by the "harmless error" statute.

> "Instructions to acquit, if there was reasonable doubt as to the petitioner's guilt, were given in other parts of the charge. Those were general instructions. They would be adequate, standing alone. But on the crucial issue of the trial—whether petitioner or one of four other persons stole the coupons from the bank—no such qualification was made; and the question was so put as to suggest a different standard of guilt. As stated by Judge Frank in his dissenting opinion below: * * * So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief. Or to put the matter another way, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime. See *Quercia v. United States,* 289 U. S. 466, 469.

The 'harmless error' statute (Judicial Code, Sec. 269, 28 U. S. C. Sec. 391) means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. *Boyd v. United States,* 271 U. S. 104, 107. Yet as stated in *McCandless v. United States,* 298 U. S. 342, 347-348, 'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.' It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging. And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial, and hence treat it as a minor aberration of trivial consequence. Nor it is enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach v. United States,* 327 U. S. ....." (14 L. Ed. 4449; 90 L. Ed. (Adv.) 1211-1212.)

Of the instant case it cannot be said as in the *Bihn* case, "while there was sufficient evidence for the jury, the case against the petitioner was not open and shut". So far as Legatos is concerned, the case was closed in Legatos' favor at the conclusion of the taking of testimony, except for the misconception of the prosecution followed by the court that Legatos "was bound at his peril".

The court's failure to give the instructions on intent proposed by the defendant constituted serious error. The court's incorrect instruction on the one vital issue was the opening of the case against Legatos. The repetition of the instruction on two separate occasions (apparently against the common sense judgment of the jurors) effectively shut the case against Legatos and was so fatal as to deprive him of a fair trial.

POINT 10c.

THE COURT ERRED BY INSTRUCTING THE JURY THAT IRRESPECTIVE OF THE LACK OF KNOWLEDGE OF DEFENDANT AS AN EMPLOYER, THE DEFENDANT COULD BE HELD CRIMINALLY LIABLE FOR THE ACTS OF HIS EMPLOYEE.

The instruction involved is the same as that considered under the discussion in Point 10b.

POINT 11a.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE JURY, IN ORDER TO FIND THE DEFENDANT GUILTY UNDER THE FIRST COUNT, MUST FIND THAT THE DEFENDANT WILLFULLY VIOLATED SECTION 175.41 OF REGULATIONS 13.

The discussion under Point 10b contains the applicable authority that the jury were entitled to instructions that in order to violate Section 2871 of the Internal Revenue Code and Section 175.41 of Regulations 13, they must find that the defendant acted willfully in violation of the section and the law and the rules. The entire discussion is applicable to Instruction No. 4, which was proposed by the defendant and was refused. The instruction as it appears at page 237 of the printed record was as follows:

> "Before either defendant may be found guilty under the First Count of the Indictment, it is necessary that you find beyond all reasonable doubt that he 'willfully violated' the regulations involved. Willfullness is made a vital ingredient of the crime by statute, and this means that the defendant must have had a knowledge and a purpose to do wrong."

Objection to the failure to give this instruction appears at page 260 of the printed record. It is to be observed, in connection with the discussion under Point 10b that the entire discussion is applicable to the refusal of the court to give proposed instruction No. 4.

POINT 11c.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT AN EMPLOYER WAS NOT CRIMINALLY RESPONSIBLE FOR THE ACTS OF HIS EMPLOYEE UNLESS THE EMPLOYER AUTHORIZES SUCH ACTS.

The defendant's Proposed Instruction No. 10, which appears at pages 239 and 240 of the printed record, was as follows:

> "You may not presume that other persons, even though they were employees, had authority to do a criminal act on behalf of either defendants, and if you find that some or all of the bottles described in the First Count of the Indictment were reused in violation of regulations, but do not find that both of the defendants personally reused the bottle or bottles, then as to each defendant who did personally not reuse any bottles unless you find beyond all reasonable doubt that he directly authorized or consented to the reuse in violation of regulations, it is your duty to acquit him under the First Count of the Indictment."

The entire argument under Point 10b is pertinent to the above instruction and demonstrates that defendant's Proposed Instruction No. 10 was a correct statement of the law and one which the defendant was entitled to have read to the jury. As demonstrated under the discussion under Point 10b, the court and the government followed a theory of the law diametrically opposed to the law as stated in Instruction No. 10, resulting in the judge's failure to give the instruction, and thus committing prejudicial error in giving an erroneous instruction and refusing to give a proper one.

No specific objection was made for failure to give defendant's proposed Instruction No. 10, but objection to the whole character of instruction on intent appears at pages 266 to 268 of the printed record.

POINT 12.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE, A JUDGMENT OF ACQUITTAL.

The same argument that was advanced under Point 8 is applicable to Point 12. The court's error in refusing to grant defendant's motion at the close of the taking of testimony in the case, was repeated by the failure of the court to grant a new trial or, in the alternative, a motion for judgment of acquittal after the jury had returned its verdict.

The written motion was filed and appears at pages 16 to 18 of the printed record, and the denial of the motion appears at page 19 of the printed record. The discussion under Point 8 is incorporated in this Point for all purposes of argument.

CONCLUSION.

Defendant stands convicted of violating a revenue statute and has been given the maximum sentence. Yet no suggestion is made that he or any of his employees contemplated defrauding the government of revenue, and there is no evidence that defendant himself did any act in violation of the statute or the regulations

promulgated under it. This conviction should be reversed and defendant's motion for acquittal granted, because:

(a) The count of the indictment upon which defendant was convicted does not state an offense against the United States;

(b) The court incorrectly instructed the jury as to the law under which it must reach its verdict;

(c) The evidence introduced against defendant was obtained by an unlawful search and seizure;

(d) There were prejudicial errors in the admission of testimony, especially the admission of testimony as to an alleged opinion expressed privately by a government witness to the prosecuting attorney.

Dated, Sacramento, California,
August 7, 1946.

Respectfully submitted,
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